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*Published in:*  
Scots Law Times

*Publication date:*  
2017

*Document Version*  
Author accepted manuscript

[Link to publication in ResearchOnline](#)

*Citation for published version (Harvard):*  
Russell, EJ 2017, 'Historic abuse - the saga continues', *Scots Law Times*, pp. 67-77.  
<<http://www.sweetandmaxwell.co.uk/wgreen/scots-law-times.htm>>

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## Historic abuse-the saga continues

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*The author revisits the issue of prescription and limitation of actions in the context of historic abuse under reference to the recent decision in K v Marist Brothers [2017] CSIH 2.*

### Introduction

Recent years have witnessed a steady stream of cases in the Scottish courts in which adult pursuers have sought reparation in respect of abuse allegedly inflicted upon them in childhood. Given the historic nature of the claims, most of the cases have failed owing to the application of the statutory provisions found in the Prescription and Limitation (Scotland) Act 1973. *K v Marist Brothers* [2017] CSIH 2 is the latest in a long line of such cases. Once again, as in so many of the cases which have gone before it, the outcome in *K* would prove unfavourable to the pursuer. In this article, the author examines the alleged facts and legal issues which arose in *K* and suggests that, until such time as legal reform is effected, such cases face limited prospects of success.

### The law

The modern law on prescription and limitation is found in the Prescription and Limitation (Scotland) Act 1973, as amended. The key distinction between the two concepts is that prescription serves to extinguish an obligation, whereas limitation merely bars a right of action. ("Limitation...deprives the litigant of a forensic remedy but does not extinguish his right"- *Ministry of Defence v Iraqi Civilians* [2016] U.K.S.C. 25 *per* Lord Sumption at para.1.) (See, also, the dictum of Lord Justice Clerk Cooper in *Macdonald v North of Scotland Bank* 1942 S.C. 369 at p.373). The focus in this article is, of course, on actions and obligations arising from personal injuries and the discussion is restricted accordingly. As far as obligations to make reparation in respect of personal injuries are concerned, such obligations are not subject to the short negative prescription of five years (1973 Act, s.6 and Sch.1, para.2 (g)). Nor are such obligations any longer subject to the long negative prescription of twenty years (1973 Act, s.7(2)). The removal of such obligations from the operation of the long negative prescription was effected by the Prescription and Limitation (Scotland) Act 1984, s.6(1), Sch.1, para. 2. That amendment was not retrospective in nature however (1984 Act, s.5(3)). As a result,

any such obligations which had *already* prescribed before the coming into force of the 1984 Act remained extinguished. The 1984 Act came into force on September 26, 1984. To determine the date on which such “already extinguished” obligations prescribed, it is necessary to ascertain the starting date of the twenty year period. Sections 7(1) and 11 of the 1973 Act provide that time runs from the date on which the obligation becomes enforceable. That will be either (1) the date on which the loss, injury or damage occurred, or (2) in the case of a continuing wrong, with damage occurring before its cessation, the date on which the wrong ceased. In *K v Gilmartin’s Executrix* 2004 S.C. 784 the pursuer alleged that he had been abused by a schoolteacher between 1955 and 1961. The Inner House held that the obligation became enforceable at the end of 1961 and was thus extinguished by the long negative prescription in 1981. It would appear to be implicit in the First Division’s judgment that the pursuer’s loss resulted from a continuing wrong. In summary, obligations arising from personal injury are subject to neither the short nor the long negative prescription, with the proviso that where injury was sustained or a continuing wrong ceased before September 26, 1964, such obligations (barring any relevant claim or relevant acknowledgment) will have been extinguished by the long negative prescription. Periods of legal disability (i.e. nonage and unsoundness of mind) and lack of awareness of injury do not prevent the running of the long negative prescription.

Actions for personal injury are however subject to rules of limitation. The main statutory provision is s.17 of the 1973 Act which provides for a three year period of limitation (the “triennium”). The period runs from (1) the date on which the injuries were sustained or, if later, the date on which a continuing wrong ceased (in terms of s.17(2)(a)) or (2) the date on which the pursuer became actually or constructively aware of three statutory facts (in terms of s.17(2)(b)). These facts are (i) that the injuries were sufficiently serious to justify bringing an action (on the assumption that the defender does not dispute liability and is able to satisfy a decree) (ii) that the injuries were attributable to an act or omission and (iii) that the defender was a person to whose act or omission the injuries were attributable or the employer or principal of such a person. A lack of awareness of a right of legal action is not relevant to this analysis (1973 Act, s.22(3)). Thus, time runs against the pursuer who is aware of the three statutory

facts even if he is unaware that he has a right of action. Many historic abuse cases have emphasised this point-see, for example, *Stephen Findleton v Quarriers* [2006] CSOH 157 (at paras.61 and 64).

The date of *constructive* awareness (i.e. the date on which it was “reasonably practicable” for the pursuer to become aware of the statutory facts) may predate the date of *actual* awareness of the statutory facts (see *Elliot v J & C Finney* 1989 S.L.T. 208).

The awareness provision is of particular relevance in latent disease cases where the pursuer is initially unaware that he has suffered injury or in cases where the pursuer has suffered injury but attributed it erroneously to say the ageing process rather than to a legal wrong or perhaps where the pursuer is initially unable to identify the correct defender (for example, in a “hit and run” incident). While attempts have been made to invoke the awareness provision in the context of historic abuse in an effort to delay the commencement of the limitation period, such attempts have been unsuccessful.

Section 17(3) of the Act provides that “[i]n the computation of the [limitation period] there shall be disregarded any time during which the person who sustained the injuries was under legal disability by reason of nonage or unsoundness of mind.” It follows that time does not begin to run against a child until he or she attains the age of 16 (Age of Legal Capacity (Scotland) Act 1991, s.1(2)). (Prior to the 1991 Act, time did not run until the young person attained the age of 18.)

Section 19A of the 1973 Act confers a power on the court, if it considers it equitable to do so, to permit an action to be brought notwithstanding the provisions of s.17.

### **Application of the law in historic abuse cases**

Given that it is the very nature of “historic” abuse cases that the events complained of occurred many years ago, attempts have been made by victims of such abuse to mobilise some of the statutory provisions (most notably the provisions on lack of awareness and the equitable discretion) in an effort to maintain their actions. Survivors of abuse have largely failed in such attempts. Recently, however, in *K v Marist Brothers* [2017] CSIH 2, an attempt was made to rely on the unsoundness of mind provision in s.17(3) of the 1973 Act in an effort to delay the running of the limitation period. This, too, failed. The reasons for the failure of that argument will be examined below.

First, however, a brief review of litigation to date demonstrates the lack of success experienced by survivors in their attempts to progress their actions.

An awareness argument has been invoked without success in several historic abuse cases. Thus, in a case involving alleged abuse at Nazareth House in Glasgow it was held that a lack of awareness of an entitlement to sue until newspaper articles highlighted institutional abuse did not serve to engage s.17(2)(b) of the 1973 Act: *B v Murray (No. 1)* 2004 S.L.T. 967. When that case reached the Inner House - reported as *AS v Poor Sisters of Nazareth* 2007 S.C. 688 - the pursuers argued that awareness of the first statutory fact concerning sufficient seriousness of injuries involved not only the issue of quantum but also consideration of whether a pursuer would realise that the injury called for resort to litigation. It was argued that the pursuers belonged to a class of persons who were afflicted by the “silencing effect” of the abuse which they claimed to have suffered. They came from poor family backgrounds, felt shame and embarrassment, lacked confidence and did not think that they would be believed. Until alerted by media reports that they could claim damages they were not aware that their injuries were sufficiently serious to justify bringing an action. That argument was roundly rejected by the Inner House, Lord President Hamilton observing that given that the statutory fact proceeds on the basis that liability and solvency of the defender are assumed and that knowledge of actionability is irrelevant “the subhead is concerned only with the extent of the injury, in terms of quantum of damages” (at para.25). The pursuers’ pleadings demonstrated that they did not seek to advance a case that they were unaware that the injuries were of sufficient gravity to warrant proceedings on the statutory assumptions. Rather, the averments contended “for an immediate and thereafter successive continuing injury in the shape of the initial alleged physical assaults and other deficits in the standard of care, leading to psychological difficulties; the loss of employment opportunities; and loss of earnings following their leaving Nazareth House” (at para.28).

Lord Eassie made similar observations regarding quantum in *CG v Glasgow City Council* 2011 S.C. 1. That case arose from abuse alleged to have been inflicted upon the pursuer at Kerelaw Residential School between 1992 and 1995. The summons was not served until 2007. The pursuer averred that, at the time of the incidents, she did not regard herself as having been injured sufficiently seriously to justify the bringing of an action. Lord Eassie

commented (at para.30) that such an averment did not really address the collective protracted history of the alleged abuse. Delivering the opinion of an Extra Division, he stated (at para.31): “In our view, it cannot be said that the catalogue of physical and serious sexual abuse of which the pursuer now complains would not have furnished, on her leaving the school, a claim of damages of sufficient magnitude to make worthwhile the raising of proceedings - again, of course, on the important statutory assumptions. In other words, it cannot be said that the damages which would be awarded to the pursuer in respect of that abuse would be so small as not to justify the taking of steps by way of litigation on those particular statutory assumptions.”

A lack of awareness was once again prayed in aid by the pursuer in *M v O'Neill* 2006 S.L.T. 823. An action in respect of psychological injuries was raised in 2000 in respect of systematic abuse said to have been inflicted upon the pursuer at Smyllum Orphanage in the late 1960s. The pursuer asserted that she did not have the requisite awareness until 1997 when she was first made aware that she could make a claim following publication of a newspaper article. As far as the second and third statutory facts were concerned, Lord Glennie held that the pursuer was linking her distressed mental state to the abuse (i.e. the act or omission of the defenders) long before the newspaper articles began to emerge and from the late 1970s at the latest. (See paras.72 and 77). As far as the first statutory fact was concerned, Lord Glennie acknowledged (at para.77) that he had “more difficulty” in fixing a date on which the pursuer had awareness that her injuries were “sufficiently serious” to justify bringing an action. Earlier in his opinion, Lord Glennie had stated (at para.33):

“It seems to follow from [the] two statutory assumptions [of admitted liability and solvency], that the factors relevant to an awareness of whether the injuries are “sufficiently serious to justify his bringing an action of damages” will be circumscribed...The question whether it is worthwhile bringing an action of damages will be judged substantially by reference to matters of quantum (“is it worth suing to get such and such an award?”)”.

Lord Glennie continued (at para.77):

“[I]t seems to me clear from the account of her problems in the late 1980s, as described to [a psychologist working at the Keil Centre], that she knew by then that the psychological difficulties from which she was suffering were very significant. What she did not know then was that there was a possibility of bringing an action against the defenders. This is not a material consideration in terms of the

section.”

On the question of constructive awareness, Lord Glennie said this (at para.36):

“Feelings of inadequacy, embarrassment, reluctance to come forward, fear of being disbelieved, and the like, may be entirely understandable and provide a reasonable excuse for not taking the matter further at a particular time, but they do not touch on the *practicability* of finding out, the only issue with which s.17(2)(b) is concerned.”

Any gaps in the pursuer’s actual awareness were filled, in Lord Glennie’s view, by constructive awareness. It was reasonably practicable for the pursuer to have obtained awareness. The pursuer “had every opportunity of explaining her problems to the professionals with whom she was put in touch...had she done so, she would have been given appropriate help and referred, as necessary, to others who could help” (para.78). While that may not have led to an awareness of the possibility of legal proceedings, that was not required in terms of the legislation.

In *McE v de La Salle Brothers* 2007 S.C. 556 the pursuer’s action arose from abuse said to have been inflicted upon him at St Ninian’s residential school, Stirling between 1963 and 1966. The action was commenced in May 2000. The issue of repressed memory featured in the pursuer’s pleadings. It was said that, until he underwent therapy, the consequences of the abuse were such that the victim did not possess the awareness required by s.17(2)(b). The Inner House held that the action had suffered limitation. The pursuer’s pleadings indicated that he was aware that he had been subject to very serious assaults and “it would be absurd if a claimant could avoid the consequences of s.17(2)(b) by saying that he had put to the back of his mind his actual awareness of the statutory facts” (*per* Lord Osborne at para.173). There was no statutory basis for the running of time to be interrupted by suppressed memory or induced reticence.

More recently in *D v Murray* [2012] CSOH 109; 2012 G.W.D. 24-503 it was held that the pursuer’s belief that nobody would listen to his complaints of abuse (said to have been inflicted upon him while he was resident in Nazareth House, Aberdeen in the 1970s), did not amount to a lack of awareness on his part. Lord Drummond Young stated (at para.13):

“The pursuer avers that while he was still in Nazareth House he and his brothers complained to a named trainee social worker about the home and about Sister Mary Margaret in particular. He further avers that he had nightmares about the home throughout

his teenage and adult life. His problem was not a lack of knowledge about what happened to him, nor about the seriousness of what had happened, nor about who was responsible, but because he had not thought that anyone would listen to his complaints about the home until he read the press articles during the summer of 1997. That does not, however, satisfy the criteria in section 17(2)(b)."

The pursuer's averments that he did not have the requisite awareness until newspaper articles were published in 1997 were directly contradicted by the averments noted above by Lord Drummond Young. His Lordship continued (at para.14):

"[A]ll that the newspaper articles in 1997 are said to have done was to make the pursuer aware that his complaints might be taken seriously. That does not involve his discovery of knowledge relating to his ill-treatment in the home. Section 17(2)(b), however, relates to the pursuer's coming aware of certain specified facts which relate to his injuries, their attribution and the position of the defender; these do not include the proposition that the pursuer's complaints might not be taken seriously. The statutory facts set out in that provision are not concerned with knowledge of action ability, but only with the extent and seriousness of the injuries and the responsibility of the defender."

A similarly parsimonious approach has been taken to the equitable extension in the context of historic abuse. Thus, the House of Lords refused to exercise the s.19A discretion in *AS v Poor Sisters of Nazareth* 2008 S.C. (H.L.) 146, thereby endorsing the decisions of the Inner House (2007 S.C. 688) and the Lord Ordinary (2005 S.L.T. 982). Lord Hope, with whose opinion all the other judges in the House of Lords agreed, stated (at para.25):

"The issue on which the court must concentrate is whether the defender can show that, in defending the action, there will be the real possibility of significant prejudice. As McHugh J pointed out in *Brisbane South Regional Health Authority v Taylor* (p 255) it seems more in accord with the legislative policy that the pursuer's lost right should not be revived than that the defender should have a spent liability reimposed on him. The burden rests on the party who seeks to obtain the benefit of the remedy. The court must, of course, give full weight to his explanation for the delay and the equitable considerations that it gives rise to. But proof that the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour."



The House of Lords held that the Lord Ordinary (Lord Drummond Young) had been entitled to reach his conclusion that the prejudice caused to the defender by the lapse of time in raising the proceedings (including the loss of evidence that resulted from it) was, by itself, a sufficient reason for not allowing the actions to proceed under s.19A.

*AS* was followed in *SF v Quarriers* 2016 S.C.L.R. 111. The abuse there was said to have occurred in a care home between 1965 and 1971 and to have resulted in long term psychological damage to the pursuer. The action was raised in 2004 against the operators of the care home on the grounds of their vicarious liability. Lord Bannatyne refused to allow the action to proceed. The factors which favoured the exercise of the court's discretion were far outweighed by the significant prejudice to the defender were the action to proceed. The defender could not receive a fair trial. The pursuer's alleged tormentor (Miss D) had died in 1980 and the operators of the home would therefore be denied the evidence of the person who would have been their most important witness. They would not be able properly to defend themselves. Moreover, it would not only be difficult to find other witnesses who had been present in the house with the pursuer at the material time, but also inappropriate for the defender to make unsolicited approaches to such persons. Other staff members working in other parts of the care home would not be in a position to give any real insight into what might have happened. In any event, "the most serious allegations of abuse made by the pursuer against Miss D appear to have happened in private and at night" (at para.157). The events complained of ended 33 years before the action was raised, leading to a decline in the quality of the available evidence. Social mores had changed in the last 40 years and it would be difficult to reconstruct social attitudes of the 1960s. In addition, the defender's position had been significantly prejudiced by the change in the law of vicarious liability effected by *Lister v Hesley Hall Ltd* [2002] 1 A.C. 215. The litigation had already been protracted and as the pursuer was legally aided, any award of expenses in the defender's favour would not be recoverable. In *M v O'Neill* 2006 S.L.T. 823 (discussed above in the context of awareness) the court once again refused to exercise its discretion under s.19A. Its exercise would have resulted in considerable prejudice to the defenders. They would have been required to defend an action in respect of events which were alleged to have occurred some 35 years earlier. Such a lengthy delay leads

inevitably to loss of evidence and a decline in its quality. A fair trial was no longer possible and the action was dismissed.

An application under s.19A was again refused in *D v Murray* [2012] CSOH 109. The Lord Ordinary held that the pursuer had failed to give a cogent explanation for the delay in raising proceedings. The fact that he did not turn his mind to the possibility of litigation until he saw press coverage in 1997 (concerning abuse in children's homes) had been expressly rejected as a relevant factor for exercising the discretion in *AS v Poor Sisters of Nazareth*. The pursuer's averments that he could not reasonably have been expected to commence adversarial litigation before he read the press articles, and that the delay in raising the action was attributable to the pursuer's treatment by a particular nun lacked sufficient specification to permit proof. In particular, nothing was said about the psychological processes whereby treatment at the hands of the nun should cause the pursuer not to proceed with his action. Furthermore, the likelihood of significant prejudice to the defenders was "very clear indeed" (para.22). Defending the action would be especially difficult where many years had elapsed since the events in question. In addition, attitudes towards the physical punishment of children had changed dramatically in the intervening period, and that in itself "lends a particularly difficult dimension to the assessment of events that happened more than 30 years ago" (para.20).

In *W v Trustees of the Roman Catholic Archdiocese of St Andrews and Edinburgh* [2013] CSOH 185, the pursuer sought damages in respect of sexual abuse allegedly perpetrated some 20 years earlier by a priest while the pursuer was a school pupil. The action which was directed against the archdiocese was held to have suffered limitation and the pursuer's averments anent s.19A were held to be irrelevant. The issue of prejudice to the archdiocese rested on the priest's death in 2006 and the 20 year gap between the cessation of the alleged abuse and the service of the summons. The archdiocese would be exposed to the real possibility of significant, and most likely inevitable, prejudice in defending the action. There were real concerns about the quality of evidence which could be led in any evidential hearing and there would also be substantial concern about the breach of fair trial protections. The action was dismissed.

As far as the author is aware, the only successful application for relief under s.19A in the context of historic abuse is found in the

case of *A v N* 2015 S.L.T. 289. A was born on 10 December 1967. She raised an action in January 2004 against her uncle in respect of a course of sexual abuse allegedly perpetrated between 1975 and 1997 (from when she was seven years old until she was 30). Although the action was held to be time barred, the Lord Ordinary (Lord Kinclaven) held that it was equitable to allow it to proceed. The fact that A became emotionally dependent upon N as a child, and that N continued to exploit the pursuer throughout her adult life were both factors which might be relevant to explain the delay in raising proceedings. The first person to inform A in any meaningful manner that she had a possible right of action for damages did so in 2003, and thereafter, a claim was brought expeditiously. N had not suffered any real prejudice in his ability to defend the action. The Lord Ordinary's decision was subsequently upheld by the Inner House.

### ***K v Marist Brothers*—the alleged facts**

Attention now turns to the case of *K v Marist Brothers*, where, for the first time in the Scottish courts, an “unsoundness of mind” argument was advanced in the context of historic abuse. The case also involved consideration of the equitable discretion and the long negative prescription.

The pursuer, who was born in October 1955, alleged that he had been physically and sexually abused while he was a boarding pupil at St Columba's School, Largs, in the early 1960s. The pursuer averred that, as a result of the abuse, he suffered anxiety, depression, low mood, difficulty in concentration and that his personality was adversely affected. The abuse was said to have been perpetrated by a certain Brother Germanus who was responsible for the dormitory arrangements at the school. It was that role which had afforded him the opportunity to commit the abuse. The school was run by the Marist Brothers, the defenders in the action, upon whom the summons was served in July 2015. As far as the delay in coming forward was concerned, the pursuer claimed to have been threatened by Brother Germanus that if he told of “our little secret” he would never see his deceased younger brother in heaven. As a young child, being taught at a Catholic School, the pursuer accepted “*as the Gospel truth*” what Brother Germanus had told him. The threat affected him deeply and prevented him coming forward with the allegations until 2013. It was the pursuer's “*absolute belief*” that if he ever spoke of the abuse he would not see his deceased brother again. He was beset with feelings of guilt, shame and cowardice.

### **Outer House Decision [2016] CSOH 54**

The matter came before Lady Wolffe for a preliminary proof on prescription and limitation. For the pursuer, evidence was led from the pursuer himself, from his wife and from Brother Ronald McEwan. The defenders led evidence from only one witness, Brother Brendan Geary. There were three legal issues which arose before the Lord Ordinary, as follows: (1) whether the obligation had prescribed (2) if the obligation had not prescribed, whether the action had suffered limitation and (3) if the action was time barred, whether it should be allowed to proceed under the equitable discretion. The case was disposed of by Lady Wolffe on the basis that the obligation had been extinguished by the long negative prescription. The statutory removal of obligations to make reparation for personal injury from the ambit of the long negative prescription was not retrospective with the result, as stated by Lady Wolffe (at para.72), that “the long negative prescription continued to apply to any obligation to make reparation for any act or omission completed prior to 26 September 1964.” For the purposes of the preliminary proof, the abuse was assumed to be co-extensive with the pursuer’s attendance at the School. In evidence, however, the pursuer was unable to recall if he began at St Columba’s in the summer before he turned 7 (i.e. summer 1962), or the summer after that (i.e. summer 1963). He was at the school for no more than about two years. If the pursuer started at St Columba’s before he turned 7, he would have left in the summer of 1964 whereas if he started just short of his 8th birthday, his second year would have ended in the summer of 1965. The Lord Ordinary concluded that the pursuer’s evidence failed to establish that he attended the school on or after 26 September 1964, that date being “of critical importance” (at para.73). Accordingly, the obligation was extinguished by the long negative prescription.

In addressing the matter of prescription, Lady Wolffe noted that the 1973 Act contained no express provision on the onus of proof. She stated (at para.74):

“In the absence of such provision, the general rule is that the party affirming a proposition has the burden of proving it. However, the affirmative proposition can be framed in a number of ways: for the pursuer, it is that a substantive claim subsists, notwithstanding the passage of time; for the defender, it is that the pursuer’s claim has been extinguished by prescription. The question of onus in this

context is not free from difficulty.”

In the absence of full argument on the issue, Lady Wolffe inclined to the view that the onus of proof was on the pursuer. Such a view was consistent with the observation of J F Wheatley, QC, in *Richardson v Quercus* (unreported, 25 March 1997) to the effect that once the issue of prescription has been raised it is for the pursuer to establish that his right subsists. Lady Wolffe’s approach was also consistent with the decision of Lord Menzies in *Pelagic Freezing (Scotland) Ltd v Lovie Construction Ltd* [2010] CSOH 145.

Because Lady Wolffe concluded that the pursuer had failed to establish that he had attended the school after 26 September 1964 it followed that the *whole* of the pursuer’s claim has been extinguished by the long negative prescription. Had her Ladyship found that the pursuer had attended the school at any time after 26 September 1964, she would have been required to consider whether the alleged abuse constituted a continuing act. If it did, the obligation would have become enforceable (and hence prescription would begin to run) only upon the cessation of that continuing act with the result that the obligation to make reparation would not have prescribed.

Interestingly, (and in contrast to the approach adopted in *K v Gilmartin’s Exrx*, above) Lady Wolffe took the view that the case involved a series of discrete sexual and physical assaults rather than one continuing wrong. Accepting the analysis offered by counsel for the defender, Lady Wolffe stated (at para.77): “Upon completion of each of these assaults, time began to run. This was of a different character than the kind of ongoing continuous “act” or default...such as that by an employer exposing an employee to excessive noise or to asbestos on a continuing basis over weeks, or months or years. If the pursuer wished to rely on section 11(2) to establish a continuing act, then it was incumbent upon him to lead evidence to do so. On the whole evidence, such as it was, I would not have found it proved that the conduct described by the pursuer was of the requisite “continuing” character such that time only began to run from the date of the last such assaultative act.”

Lady Wolffe’s conclusion on prescription was sufficient to dispose of the case. It put “an end to the matter” with the result that “the issue of limitation [became] irrelevant.” (at para. 78). In the light of

the evidence and submissions, however, Lady Wolffe considered it “only right” (at para.78) that she indicated her findings on the issues of limitation.

The pursuer’s primary position on limitation was that his action was not time-barred. He relied upon the threat allegedly made to him by Brother Germanus which prevented him coming forward until 2013. The trigger for disclosure was a conversation at a family wedding when another guest extolled the virtues of the Marist Brothers. This troubled the pursuer who indicated that he had not enjoyed his time at St Columba’s. The pursuer subsequently told his wife of the abuse and contacted the Marist Brothers thereafter. He was reassured by a Brother Brendan that Brother Germanus had been wrong to say what he had said and that he need not worry about not seeing his brother again. The pursuer contacted his current solicitors in May 2015 and proceedings were raised two months later.

Although, in his pleadings, the pursuer had relied on s.17(2) of the 1973 Act, at the preliminary proof counsel for the pursuer sought to rely instead upon the “unsoundness of mind” provision of s.17(3). The defenders submitted that the pursuer had not proved any recognised or objectively verifiable mental condition sufficient to establish unsoundness of mind. Accordingly, to the extent that s.17(3) operated, it was in respect of the pursuer’s nonage only (and such nonage ceased when the pursuer attained the age of 18 in October 1973).

Counsel for the pursuer, on the other hand, submitted that the pursuer’s belief in the threat made by Brother Germanus engaged the “unsoundness of mind” provision. In support of his argument, counsel referred to one of the definitions of “unsound” in the Oxford English Dictionary, that being “not soundly based on reason or fact”. The threat issued to the pursuer did not conform to Catholic teaching. The pursuer had been led to believe a threat based on unsound doctrine. The threat operated as an absolute bar in the pursuer’s mind, and amounted to “unsoundness of mind” within the meaning of s.17(3) of the Act. The pursuer was prevented from speaking out because he believed the threat and it was not until 2013 that he was told that the threat was wrong. In counsel’s submission, the test in s.17(3) about unsoundness of mind was a subjective one. Counsel accepted that the pursuer had no diagnosable mental or psychological condition. No expert medical diagnosis was relied upon nor was any medical evidence led. Counsel argued that unsoundness of mind could be something



short of a diagnosable mental illness. This was not a case of buried memory or “abused-child syndrome”. Counsel stressed that there was no suggestion that the pursuer had forgotten the abuse. The pursuer was aware of what had happened to him. He was aware of reports in the media in the past of sexual abuse by priests.

Lady Wolffe summed up the submission in the following terms (at para.79):

“it was that the pursuer had a genuine and long-held belief in the truth of Brother Germanus’ threat and that the assertion underlying that threat was unsound as a matter of Catholic orthodoxy. The pursuer’s belief in this threat demonstrated an “unsoundness of mind” and that sufficed, it was said, for the purposes of section 17(3).”

Lady Wolffe rejected counsel’s argument as “untenable in the extreme” (at para.84) and observed that “the states of nonage and of unsoundness of mind are states of being that are objectively proved or verified” (para.85). Counsel’s submission took no account of the observations of Lord Osborne in *McE v de La Salle Brothers* 2007 S.C. 556 (at para.175) to the effect that “the running of time cannot be interrupted by a mental condition short of unsoundness of mind.” Moreover, counsel’s submission was “wholly at odds with the plain meaning and purpose of section 17(3)” (para.84). Her Ladyship continued (at para.85):

“In order to establish the unsoundness of mind sufficient to establish “*legal disability*”, the pursuer must prove that he suffered from some mental condition resulting in “*legal disability*”. This is likely to entail expert evidence to establish, objectively, that the claimant suffered from some medically recognised condition or state which was so disabling as to deprive him of legal capacity in the sense of being incapable of managing his affairs: see *Bogan’s Curator Bonis v Graham* 1992 SCLR 920 at 925...the evidence of unsoundness of mind must be such as to place the person under a “legal disability”. That is what section 17(3) of the Act requires.

Proof simply of a claimant’s subjective belief, whether in accordance with religious teaching or not, will be insufficient.”

Lady Wolffe concluded that the triennium had long expired.

The pursuer sought to rely, in the alternative, on s.19A of the 1973 Act. Unsurprisingly, the defenders resisted this application and submitted that if there was a “real possibility of significant prejudice” to the defender, as there was here, that would normally determine the matter in his favour (*per* Lord Hope in *AS v Poor*

*Sisters of Nazareth* 2008 S.C. 146 at para.25). The defenders' key witness was dead and a fair trial was not possible. The defenders placed reliance on the underlying policy and rationales for limitation. The pursuer, on the other hand, submitted that if he were not permitted to proceed with his action, which involved serious matters, he would be prejudiced. He referred to his emotions of shame, fear and cowardice. Lady Wolffe had already held that the obligation had prescribed but, had it not been so extinguished, and had limitation been a live issue, she would have had "no hesitation" (at para.88) in refusing to exercise the discretion. Generally something more than the loss of the ability to pursue the claim must be advanced by the pursuer especially where a defender proves substantial prejudice. In the instant case, "there was no suggestion that there was anything other than the pursuer's internalised views of the threat that deterred him from coming forward sooner than he did" (at para.89). There was no period when the pursuer had forgotten or, once an adult, did not know that what had been done to him was wrong. No one other than the pursuer was responsible for the failure to raise proceedings sooner.

As far as the defenders' position was concerned, they had led evidence from Brother Brendan Geary, the Provincial for the Marist Brothers Province of West-Central Europe, to the effect that St Columba's had closed in June 1982 and that there were only limited records of the school available. Indeed, as far as Brother Brendan could discover, the only records relating to the school was a box marked "Largs" which was comprised principally of a large ledger. The ledger contained two entries which appeared to reflect payments in respect of the pursuer's schooling. There was no information about what students were at the school at the relevant time or about who resided in which of the two boarding houses. Brother Brendan had not tried to locate anyone who might have been involved in the school in the early 1960s. Similarly, there was limited information about Brother Germanus who had died in 1999. There were no records of any contemporaneous report of allegations by the pursuer in respect of Brother Germanus. Another individual had come forward with allegations concerning Brother Germanus. Those allegations, as well as those of the pursuer, had been reported to the police. Her Ladyship accepted the unchallenged evidence that, beyond what was spoken to, there were no other records relating to the school or to Brother Germanus. Brother Germanus had died long ago and more than five decades had elapsed since the abuse



complained of. Her Ladyship concluded that the defenders would be materially prejudiced if the pursuer's case were permitted to proceed.

Drawing a parallel with *SF v Quarriers* 2016 S.C.L.R. 111 (see discussion above) Lady Wolffe stated (at para.91): "This, too, is a case involving allegations against a single abuser who was long dead. That circumstance alone meant that the defenders could never know what Brother Germanus' response would have been to the allegations. They could not, as Lord Bannatyne aptly put it, "properly" advance a case that Brother Germanus did not do these things. In the absence of knowing Brother Germanus' position, the defenders could do no more than put the pursuer to his proof. They could not properly lead a positive case if they had no basis to so do. The several rationales considered in detail by Lord Drummond Young in *B v Murray* (no. 2) applied with particular force to a case such as this, where an extraordinary length of time had passed. In all of these circumstances, no fair trial was possible."

In conclusion, therefore, the Lord Ordinary held that any obligation to make reparation to the pursuer had been extinguished by the long negative prescription. If she was wrong on that matter, and any or all of the pursuer's case did subsist after 26 September 1984, the pursuer's action had suffered limitation and she would have refused to exercise the discretion under s.19A in his favour. The pursuer reclaimed.

### **Inner House Decision [2017] CSIH 2**

The reclaiming motion came before the Second Division comprising the Lord Justice Clerk (Lady Dorrian), Lord Drummond Young and Lord Glennie. Lady Dorrian delivered the opinion of the court. The Second Division began by examining the limitation issues. As to the first limitation issue, the reclaimer argued before the Division that he uncritically accepted Brother Germanus' threat as constituting a dogma and that his mind was accordingly unsound within the meaning of s.17(3) of the Act. The Division took the view that the Lord Ordinary had been correct to regard this argument as "untenable." Lady Dorrian stated (at para.7):

"The basis upon which she so concluded was that unsoundness of mind required to be established objectively, and to be such as to place the person under a legal disability. That is a reference to the

precise wording of section 17(3), which provides for the disregarding, in computation of the triennium, of any time during which an injured party was “under legal disability by reason of ... unsoundness of mind”. The key to understanding this, as the Lord Ordinary recognised, is that the unsoundness of mind must be such as to create a legal disability. A legal disability is one which deprives an individual of the capacity to manage his own affairs. Before the court could accept that a pursuer had suffered from an unsoundness of mind causing such an incapacity, it would expect to hear expert evidence as to the nature of the unsoundness, and crucially, that its effect had been such as to deprive an individual of capacity. The personal belief of a pursuer, (particularly of such a limited nature as that described here), however genuinely held, is insufficient. It is impossible to characterise the reclamer’s deluded belief in this case as coming within the statutory description.”

Having rejected the unsoundness of mind argument, the Division turned its attention to the issue of the statutory discretion in s.19A of the 1973 Act. The reclamer argued that the Lord Ordinary had erred in the exercise of her discretion. It was said that she had erred in her assessment of the sufficiency of investigations carried out by the respondents and had accorded insufficient weight to the suggestion that a different complaint against Brother Germanus had been the subject of a police investigation.

Noting the Lord Ordinary’s conclusion that the respondents would be materially prejudiced if the case were allowed to proceed, Lady Dorrian stated (at para.8):

“More than five decades have passed since the alleged abuse. No complaint was made until 2014. The school closed over 34 years ago, in June 1982; there was unchallenged evidence that attempts to trace records had been unsuccessful; Brother Germanus died in 1999. The Lord Ordinary was correct to note that any assessment under section 19A required to consider the issue of possible prejudice to the respondents. No compelling reason was advanced to counter-balance the severe risk of prejudice, and there is no basis upon which it might be said that the Lord Ordinary erred in the exercise of her discretion. In fact, on the material before her, in our view the Lord Ordinary reached the only conclusion which was reasonably open to her.”

Having upheld the Lord Ordinary’s decisions on the limitation issues, the Division turned its attention briefly to the long negative prescription. It observed that there might have been an argument that the Lord Ordinary had paid insufficient attention to the effect of

a judicial admission relating to the dates on which the claimant attended St Columba's and that she erred in concluding that the abuse did not constitute a continuing act. Given the conclusions reached on the limitation points however, the prescription issue was academic and the court did not require to address it.

### **Unsoundness of mind-possible reform**

The 1973 Act itself contains no definition of the term "unsoundness of mind." *K v Marist Brothers* is the first historic abuse case in Scotland where an unsoundness of mind argument has been mobilised. Given the circumstances of the case, it is perhaps unsurprising that the argument was rejected particularly as previous case law on the interpretation of the phrase suggests that unsoundness of mind is a somewhat extreme state. In *Elliot v J & C Finney* 1989 S.L.T. 208 Lord Sutherland suggested (at p.210) that it could be argued that a person in a coma was not of sound mind and accordingly that s.17(3) would apply. In *Bogan's Curator Bonis v Graham* 1992 S.C.L.R. 920 (to which reference was made in *K*) the injured party had sustained severe brain damage which had a profound effect on the higher cognitive functions such as thinking, initiative and memory. Her mind had ceased to be in proper working order and she was held to be of unsound mind. *K v Marist Brothers* underlines the fact that unsoundness of mind must result in *legal disability* with a corresponding deprivation of capacity. The leading of expert testimony will usually be required to support any contention of unsound mind. In the absence of a statutory definition of the term, *K* certainly provides some welcome clarification.

The terminology of unsoundness of mind has attracted criticism. The Scottish Law Commission considers the term to be outdated and potentially offensive and has suggested that it be replaced with a reference to the pursuer "being incapable within the terms of s.1(6) of the Adults with Incapacity (Scotland) Act 2000." (Scottish Law Commission, Report on *Personal Injury Actions: Limitation and Prescribed Claims*, (Scot. Law Com. No 207 (2007)), para 2.71). It remains to be seen whether that recommendation will be implemented although the Scottish Government does appear to have lent its support to the commission's proposal. (Scottish Government, *Civil Law of Damages: Issues in Personal Injury-Scottish Government Response to the Consultation*, (Scottish Government, 2013), p.5. The Government has declared its intention to replace the references in the 1973 Act to 'unsoundness of mind' with references to being incapable for the purpose of

pursuing an action for damages. It would seem inevitable however that the pursuer in *K* would have been unable to satisfy any such reformulated test.

## **Conclusions**

*K v Marist Brothers* is the latest in a long line of cases from Scotland which demonstrates the difficulties faced by historic abuse victims in bringing forward their claims. Once again, an adult who claims to have been abused as a child many years ago has failed in an attempt to have his claims fully ventilated in court, his action having been thwarted by time-bar rules. On this occasion, however, the major plank of the pursuer's case was not that he did not possess the requisite awareness of the statutory facts (which argument has formed the basis of so many of the previous cases). Instead, the pursuer sought to argue that he was of unsound mind, such that time did not run against him in terms of s.17(3) of the Act. In this connection, he relied on his subjective belief in a threat which was based on unsound doctrine. Perhaps this was a somewhat ambitious argument and, certainly, in Lady Wolffe's view, it was "bound to fail" (at para.85). The case thus joins many other historic abuse cases in which arguments advanced by the pursuer in an effort to counteract the time-bar have similarly failed. It would seem that in terms of the existing legislative provisions and their interpretation, historic abuse survivors have limited prospects of securing compensation through the civil courts.

The future for historic childhood abuse victims might not however be as bleak as the cases discussed in this article suggest. The Scottish Government has recognised that historic childhood abuse cases have unique characteristics (in particular, delayed acknowledgment and disclosure) which justify a special limitation regime. At present, a government Bill is before the Scottish Parliament, the purpose of which is to remove childhood abuse claims from the limitation regime. The Limitation (Childhood Abuse) (Scotland) Bill aims to improve access to justice for survivors of childhood abuse. The Bill, which was introduced on November 16, 2016 by Michael Matheson MSP, applies to any person who was a child (defined as someone under the age of 18) when the abuse occurred or began. Abuse includes physical, sexual or emotional abuse and the Bill is not restricted to abuse which occurred "in care." The Bill will apply to rights of action which have accrued before it comes into force whether or not the

limitation period has already expired. The Bill will also apply to cases which have been previously litigated and which have been decided or settled (with no payment being made in excess of expenses) on the basis of time bar. In order to take account of European Convention on Human Rights considerations, the Bill contains certain safeguards for defenders. The court will not allow an action to proceed where the defender satisfies the court (the onus being on him) that a fair hearing is not possible. In addition, where the pursuer's right of action accrued before commencement of the new law, the action will not be allowed to proceed where the defender satisfies the court that he would be substantially prejudiced such as to outweigh the interest of the pursuer in pursuing the claim. Again, the onus lies on the defender in this regard. It should be noted that under the existing legislative regime, pursuers who seek to rely on the discretionary power of the court in terms of s.19A of the 1973 Act bear the onus of proving that it is equitable for the action to proceed. They must therefore proffer an explanation for the delay. Such explanations, as noted above, have been largely unsuccessful in the context of historic abuse. It is also noteworthy that while s.19A applications proceed on the basis that limitation is the general rule and that the discretion is an exception to it, the policy underlying the new Bill is that survivors of abuse should have access to justice. There is thus a considerable change of emphasis in policy terms. The Bill does not seek to alter the position in relation to obligations which had already prescribed before September 26, 1984. Obligations arising from abuse which occurred or ceased before September 26, 1964 will therefore remain extinguished. The Scottish Government accepts that to revive such obligations would be incompatible with the European Convention on Human Rights and would offend the principle of legal certainty. The progress of the Bill through Parliament will be followed with interest, no more so than by survivors of abuse.

